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No. 93-1463

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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1. In their Brief in Opposition, the Respondents now argue that the court of appeals was simply not bound to follow that "fundamental rule of administrative law" first articulated by this Court in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). They insist instead (Opp. 8-10) that the court of appeals was engaged in an exercise of "independent assessment" that freed it from the requirement to accommodate the agency's actual grounds in affirming the agency's decision. That argument is wrong.

a. First, the argument misapprehends the nature of the question before the court of appeals. The FCC had

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[1] Pursuant to Rule 29.1, the petitioner's parent company and affiliated subsidiaries were listed in the Petition, at ii.

ultimately decided that its 1990 Price Cap Order barred the kind of tariff filing made by petitioner because, it found, the new price cap adjustment mechanisms adopted in that order were applicable to such pre-price cap filings. (Pet. App. 21a-25a). Petitioner argued that this decision was unlawful, since it constituted the retroactive application of a preclusive new interpretation of the Price Cap Order as to which there had been no prior notice. In affirming the FCC, the court of appeals determined that the Price Cap Order *did* impose the bar the FCC inferred from it, and did so in terms clear enough to constitute adequate notice of the new rule. (Pet. App. 16a, 17a). Thus, what the court of appeals engaged in was a direct review of the essential merits of the agency's decision. In doing so, the court was not excused from compliance with *Chenery*.

The Respondents' proffered distinction between review of the reasonableness of an agency's decision and review of the adequacy of notice of that decision (Opp. 9) is to no avail. Here those questions are inextricably intertwined. The FCC did not purport to decide in 1993 whether petitioner could make a certain kind of tariff filing, but only whether that decision had already been made in its 1990 Price Cap Order. The court's review was necessarily limited to whether the FCC's interpretation of its own 1990 order was reasonable, and the court was bound to reverse the FCC if the grounds the agency relied upon to justify its interpretation were inadequate.

Indeed, because of the posture of the case before the agency (it had been remanded after the notice issue had already been raised), the FCC expressly held that petitioner had received adequate notice of the preclusive rule it had discovered in its 1990 Price Cap Order. (Pet. App. 25a). The court's consideration of the same question on appeal was thus a direct review of the agency's determination, not an independent and unrelated inquiry outside the strictures of *Chenery*.

In any event, the argument pressed by the Respondents ultimately makes no sense in light of the purposes of the *Chenery* rule. Even if the question before the court of appeals had been a collateral issue requiring independent review, the fundamental concerns for separation of powers and judicial and administrative efficiency underlying *Chenery* should properly have barred the court from affirming the agency based on an interpretation of the agency's orders that flatly contradicted the agency's own interpretation of those orders. The court's conclusion that the Price Cap Order had provided adequate notice of a preclusive new rule relied heavily (Pet. App. 10a-11a, 13a) on a reading of paragraph 245 of the order, suggested by appellate counsel for the FCC, that was precisely the opposite of the FCC's own explicit reading of that paragraph. (*See* Pet. 13). The distinction proposed by the Respondents would thus produce exactly the kind of judicial overreaching the *Chenery* principle was intended to prevent.

b. The court of appeals plainly violated the *Chenery* principle in its decision below. The contrary assertions of the Respondents are based on misreadings of the record and of the petition's argument.

i. The FCC did not, as the Respondents assert (Opp. 11), "rel[y] upon paragraph 245 in concluding that petitioner had adequate notice." Respondents' only support for this proposition is a citation to a string citation in a footnote in a "Background" section of the FCC's decision that does not address the question of notice. The FCC's conclusory finding of adequate notice appears in a different section of the decision, which nowhere cites or relies upon paragraph 245. (Pet. App. 25a). This is not surprising, since the FCC had previously interpreted paragraph 245 as meaning precisely the opposite. (Pet. App. 42a-43a). The contradictory interpretation ultimately favored by the court of appeals was suggested for the first time in appellate counsel's brief to the court, not in any FCC decision.

ii. The Respondents also mischaracterize the record in arguing (Opp. 12-13) that the court of appeals did not arrogate to itself the assessment of regulatory policy considerations properly left to the FCC. As discussed in the Petition (Pet. 15-16), the FCC had identified a concern for avoiding pre-price cap cost manipulation by LECs. But as petitioner specifically substantiated (Pet. 16), the FCC relied upon that justification only to engage in "heightened scrutiny" of petitioner's filing under conventional rate of return analysis, and never to justify the preclusive application of the new price cap adjustment mechanisms.[2] Although the court of appeals found support for affirming the FCC's ultimate holding in the FCC's discussion of certain policy concerns in its Price Cap Order,[3] the FCC itself did not rely upon that justification. This is precisely what *Chenery* prohibits.

2. The arguments of the Respondents cannot obscure the simple fact that the court of appeals, when faced with a set of utterly irreconcilable agency rationalizations for the rejection of the petitioner's tariff filing, supplied a different rationalization. In affirming the FCC's decision, the court not only relied on reasons the FCC had not adopted, but it relied on interpretations of a prior FCC order that contradicted the FCC's own interpretation of that same order. Such substitution of judgment violates the holdings of this Court in *Chenery* and its progeny, and should not be allowed to stand. The deci-

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[2] Remarkably, the Respondents misquote the petitioner's argument (*compare* Opp. 12 *with* Pet. 16) before asserting that it is incorrect. The petitioner never argued, as Respondents claim, that the FCC failed to address cost-manipulation concerns, only that it relied upon them to justify a different remedy than the one the court of appeals affirmed on the basis of those same concerns.

[3] Again, the court relied for this conclusion principally on its interpretation of paragraph 245 of the Price Cap Order, which the FCC had interpreted to the opposite effect. *Compare* Pet. App. 10a-11a, 13a *with* Pet. App. 42a-43a.

sion of the FCC must be upheld, if at all, only on the basis articulated by the FCC itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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